Supreme Court, U.S.
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No. 01-419

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

CITY OF COLUMBUS, MITCHELL BROWN, and BOBBIE BEAVERS,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., and THE TOWING AND RECOVERY ASSOCIATION OF OHIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Does the preemption clause of the Interstate Commerce Act, 49 U.S.C. § 14501(c), expressly preempt those municipal regulations that apply to consensual towing operations, as the court below held consistent with the holdings of other federal appellate courts and state courts of last resort?

LIST OF PARTIES

The only parties to this proceeding are listed in the caption. Pursuant to Supreme Court Rule 29.1, the Court is advised that respondent has no parent companies or subsidiaries that are not wholly owned.

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petition for a writ of certiorari in this case. The petition raises no legal issues of general importance beyond the facts of this particular case or that otherwise would merit the Court's plenary review.

Although petitioners paint the statutory issues with a broad brush, there is as yet no concrete split in authority among the lower courts that is of any practical consequence. Four federal courts of appeals, including the court below, have now ruled that the preemption clause of the Interstate Commerce Act, 49 U.S.C. § 14501(c), preempts municipal regulations that apply to consensual towing operations. Putting aside the unappealed rulings of various federal trial courts, no court has ruled to the

contrary. Although the lower courts have disagreed on certain elements of the legal analysis in some of their opinions, all have agreed that the application of municipal regulations to *consensual* towing operations, which amounts to bare economic regulation, poses quite distinct issues from their application to *nonconsensual* towing operations, which raises distinct and more significant safety concerns. Only the former category has been put at issue in this case.

Once the grounds of this distinction are understood, the supposed split in authority dissolves, and each of the cases cited by petitioners as allegedly reaching a conflicting result is squarely distinguishable on its facts. Moreover, the principal safety concerns noted by petitioners are easily resolved within the contours of the uniform authority set out in the lower court decisions to date. In particular, the law in this area continues to evolve, and the lower courts now are regularly upholding municipal regulation of nonconsensual towing operations under the "municipal proprietor" exception to preemption that this Court recognized in *Building & Constr. Trades Council of Metro Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226-29 (1993). This recent development is not directly at issue in this case, yet it further diminishes the practical importance of the statutory exemption to express preemption contained in 49 U.S.C. § 14501(c)(2)(A).

Finally, the Court has examined the putative conflict raised here on several prior occasions – including earlier this year – and has consistently deemed it unworthy of plenary review. *See, e.g., Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1085 (2001); *Ace Auto Body & Towing Ltd. v. City of New York*, 171 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999). Nothing has occurred in the interim to alter this correct assessment.

STATEMENT OF THE CASE

1. Respondent Ours Garage and Wrecker Service, Inc. ("Ours") is an Ohio corporation that operates a towing business, with its principal place of business located in Licking County, Ohio. Respondent Towing and Recovery Association of Ohio is a trade organization comprising members who do business in the towing and recovery industry in Ohio. *See* Pet. App. 1a-2a.

The towing work performed by Ours and other tow-truck operators generally breaks down into two distinct categories. "Consensual" tows are all those performed at the request of the vehicle owners, who select the towing operators they wish to use and contract with them to perform the necessary services, which may include towing, storage, security, and repair of the vehicle. "Nonconsensual" tows are all those performed without the consent of the vehicle owners. The latter category may include the towing of vehicles that are stolen or abandoned, or vehicles that are disabled in an accident when towing is directed by police or other public officials vested with such authority. Whenever feasible, the owner is required to bear the cost of such nonconsensual towing operations, which may also involve related services such as storage, security, and repair.

This distinction between consensual towing operations and nonconsensual towing operations is reflected in many state and municipal regulations in this area. *See, e.g., Petrey v. City of Toledo*, 246 F.3d 548, 551-52 (6th Cir. 2001) (distinguishing between Class A licenses, which permit holder "to conduct non-consensual tows ordered by the Toledo Police Department," and Class B licenses, which permit holder "to conduct private and third-party tows") (reprinted at Pet. App. 5a-7a).[1] The same

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[1] *See also, e.g., Ace Auto Body & Towing, Ltd. v. City of New York*, 1997 WL 669891, at *1-4 (S.D.N.Y. Oct. 28, 1997) (distinguishing between general towing regulations and DARP, SARD, and ROTOW accident management programs that govern disabled, stolen, and abandoned vehicles), *aff'd*, 171 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999); *Tocher v. City of Santa Ana*, 219 F.3d

distinction also is expressly reflected in the preemption clause of the federal statute at issue in this case. *See* 49 U.S.C. § 14501(c)(2)(C) (preemption of state or local regulation "does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle").

2. The City of Columbus has adopted ordinances that govern towing operations within the municipal limits, *see* Columbus City Code §§ 549.01-.99 (reprinted at Pet. App. 36a-47a), and the Columbus Director of Public Safety has exercised the delegated authority to issue additional rules and regulations governing towing operations, *see* City of Columbus Wrecker Rules and Regulations (reprinted at Pet. App. 47a-53a). In general, these regulations govern licensing and recordkeeping, and they make no distinction between *consensual* towing operations and *nonconsensual* towing operations. *See id.*

3. Respondents commenced this declaratory judgment action in federal district court, contending that Columbus' towing regulations are expressly preempted by the Interstate Commerce Act insofar as they apply to consensual towing operations. *See* Complaint ¶¶ 6-8 (R.1; J.A. 6-7).[2] The parties agreed that the facts were undisputed and filed cross-motions for summary judgment. The District Court (S.D. Ohio, Smith, J.) granted summary judgment for respondents, holding that the regulations were preempted "for the reasons set forth in the

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1040, 1043 (9th Cir. 2000) (describing city's "dual permit system" that distinguishes between regulation of general towing operations and establishment of a "rotational tow list" of designated towing companies used for vehicle impoundment), *cert. denied*, 121 S. Ct. 1085 (2001).

[2] "R." denotes references to the record compiled in the District Court. "J.A." denotes references to the Joint Appendix that the parties submitted to the Court of Appeals below.

virtually identical cases of *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1334 (1999) and *Anna Petrey dba Magnum Towing v. City of Toledo*, 61 F. Supp. 2d 674, 677-680 (N.D. Ohio 1999)." Pet. App. 34a.

4. While petitioners' appeal was pending, the Sixth Circuit (Keith, *Batchelder*, Moore, JJ.) issued its decision in the *Petrey* case. The City conceded that "*Petrey* controls the disposition of this case." Pet. App. 2a. The Court of Appeals noted that respondents had brought this case to enjoin enforcement of Chapter 549 of the Columbus City Code, "which regulates consensual towing operations." *Id.* It also noted that in *Petrey*, "we held that the ICA does not preempt municipal licensing and safety regulation of non-consensual towing operations when a municipality acts as a market participant, but does preempt other regulation not falling within this narrow exception." *Id.* Based on the *Petrey* decision, therefore, the Court of Appeals simply affirmed the judgment of the District Court in a brief opinion. *See id.*

REASONS FOR DENYING THE WRIT

The preemption issue presented in this case – with respect to consensual towing operations – is not certworthy because petitioners are unable to show either that a *bona fide* conflict exists among the federal circuit courts and state courts of last resort or that the Sixth Circuit's decision departed from any of the Court's precedents. The circuit courts have consistently held that municipal regulation of consensual towing operations, amounting to bare economic regulation of private commercial arrangements, is preempted. The Court has previously considered and denied other petitions for certiorari on the statutory issues raised here, and nothing has occurred in the interim to warrant plenary review in this case.

Once the practical safety concerns discussed by petitioners are placed in context of the distinction drawn in the statute and the case law between municipal regulation of consensual and

nonconsensual towing operations, it becomes clear that these concerns can be addressed in several ways that are already being implemented by other municipalities. The evolving case law in the lower courts now consistently upholds measures applicable to nonconsensual tows under the "municipal proprietor" exception to preemption. Thus the legal issues that petitioners purport to distill out of these proceedings are not cleanly presented in this case, which does not even raise any preemption issue with respect to nonconsensual tows. For all of these reasons, the Court should deny the petition.

THIS CASE PRESENTS NO ISSUES WORTHY OF REVIEW CONCERNING THE PERMISSIBLE SCOPE OF MUNICIPAL REGULATION OF CONSENSUAL TOWING OPERATIONS.

A. The Case Law in the Lower Courts Continues to Evolve in New Directions to Address the Practical Concerns Raised by Petitioners.

Petitioners contend that the decision below conflicts with decisions by two state courts of last resort and one other circuit court. *See* Pet. 7-13. The practical issue that petitioners generally identify as giving rise to the alleged conflict is "whether municipalities may promulgate public-safety regulations regarding the use of tow trucks within their city limits," including the ability to adopt safety regulations "aimed at eliminating the practice of 'chasing' – where tow trucks race one another to an accident scene in competition for business." *Id.* at 2 (quotation omitted).

As thus stated, the issue is framed far too broadly, for the case law now plainly holds that municipalities *do* have ample authority to adopt extensive regulations designed to eliminate such practices and protect the public safety, at least with respect to *nonconsensual* towing operations, where the safety concerns are most prevalent. Indeed, that is the square holding of the *Petrey* case, which provided the entire basis for the ruling below in this case. *See id.*, 246 F.3d at 553-59 (upholding Toledo's

regulations that govern "non-consensual police tows for the City" because they fall within the "municipal proprietor" exception to preemption, but holding that other regulations applicable to consensual towing operations are preempted) (Pet. App. 10a-20a). Other recent decisions are to the same effect. *See Stucky v. City of San Antonio*, 260 F.3d 424, 434-46 (5th Cir.) (under municipal proprietor exception to preemption, city can regulate nonconsensual tows but not consensual tows, and regulations that apply to latter are preempted by federal law), *reh'g denied*, 266 F.3d 342 (5th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1045-52 (9th Cir. 2000) (same), *cert. denied*, 121 S. Ct. 1085 (2001); *see also Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 691-95 (5th Cir. 1999) (upholding city's nonconsent towing ordinance under municipal proprietor exception to preemption).

Under the contours of the "municipal proprietor" doctrine, federal preemption of state and local regulatory authority is inapplicable to instances where a state or local government is acting as a market participant, and thus is acting in a proprietary capacity. *Building & Constr. Trades Council of Metro Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226-29 (1993); *see also id.* at 227 ("Our decisions in this area support the distinction between government as regulator and government as proprietor."). Thus the doctrine applies whenever municipalities mandate and direct nonconsensual tows for vehicles that are disabled in accidents or for vehicles that appear to be abandoned or stolen. Because the lower courts now are coming to rely on this rationale to uphold most municipal safety regulations, this evolving line of precedents renders subsection (c)(2)(A) of no practical relevance in such cases. From this standpoint, petitioners' claim that "acute public-safety issues [are] implicated by resolution of the [statutory] issue" raised on the facts of this case – which concerns only respondents' challenge to municipal regulation of *consensual* towing operations – is considerably overstated. Pet. 2-3.

Petitioners frame the specific legal issue here as concerning whether the statutory safety exemption set out in 49 U.S.C. § 14501(c)(2)(A) exempts "local tow-truck regulations" from falling within the provisions of the express preemption clause set out in 49 U.S.C. § 14501(c)(1). *Id.* at 7. Yet this articulation of the issue glosses over the key distinction between consensual and nonconsensual towing operations that has been drawn by Congress and the courts. The *Petrey* decision is exemplary in this regard. In that case, plaintiff and her towing company challenged the two-tier regulatory system adopted by the City of Toledo to govern towing operations within the municipal limits. Under that system, a "Class B" license permitted a tower to conduct private and third-party tows; and a "Class A" license, which imposed "more onerous and expensive requirements," was required to "conduct non-consensual tows ordered by the Toledo Police Department," which were conducted by dividing the city into a number of police towing districts and parceling out the work among the Class A licensees on a rotating basis. *Id.*, 246 F.3d at 551-52 (Pet. App. 6a-7a). The Sixth Circuit ruled in favor of plaintiff's preemption challenge to the Class B licensing scheme, finding that the city's efforts to impose economic regulations on consensual towing operations are squarely preempted under 49 U.S.C. § 14501(c). *See Petrey*, 246 F.3d at 559-64 (Pet. App. 20a-29a). At the same time, however, it upheld the city's Class A licensing scheme and system of rotating nonconsensual tows, based on the municipal proprietor exception to preemption. *See id.* at 555-59 (Pet. App. 13a-20a).

This case does not raise the same preemption issues because respondents have challenged only the enforcement of the municipal ordinance "which regulates consensual towing operations." Pet. App. 2a. Thus the issues raised here are limited to municipal regulation of traditional commercial transactions devoid of most safety concerns, and the court below did not have the occasion to apply all the parameters of its broader holding in *Petrey* that "the ICA does not preempt

regulation of non-consensual towing operations when a municipality acts as a market participant." *Id.* Indeed, this case raises no issues about the validity of municipal regulation of *nonconsensual* tows at all.

To summarize, the legal issue framed by petitioners here – whether the statutory safety exemption set out in subsection (c)(2)(A) exempts "local tow-truck regulations" from falling within the provisions of the express preemption clause set out in subsection (c)(1), Pet. 7 – misses the point that the lower courts have now largely settled the validity of such regulations as have been adopted to address key safety problems such as "chasing." These measures, which utilize nonconsensual tows, are now being consistently upheld under a *different* exception to federal preemption: the municipal proprietor exception.[3]

B. There Is No Square Decisional Conflict Here.

Particularly in light of the foregoing discussion, an examination of each case cited by petitioners to establish an ostensible split in authority reveals that the occasional differences in legal analysis that petitioners highlight have not yet produced any square conflict in the holdings actually reached by those courts.

First, the intermediate state court ruling in *Michigan Trucking Ass'n v. Michigan Pub. Serv. Comm'n*, 571 N.W.2d 734 (Mich. App. 1997), *app. denied*, 583 N.W.2d 900 (Mich.

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[3] For this reason, petitioners' statement that "the consequence of the Sixth Circuit's decision [in this case] is to force Ohio to enact any such regulations at the state level rather than allowing localities to pass laws tailored to the unique conditions of their city streets," Pet. 15, is completely incorrect. On the contrary, as shown above, municipalities are experiencing little trouble in recent cases defending their safety regulations governing *nonconsensual* towing operations under the municipal proprietor exception to preemption. Consequently, the anxiety that petitioners express about "Federal-State comity," based on their concern that the decision below may "upset this traditional allocation of State power," *id.*; *see also id.* at 22, is misplaced.

1998), is entirely inapposite to the issues raised here. Indeed, that case did not involve towing operations at all. Instead, it concerned whether the Michigan Public Service Commission was authorized to implement a safety rating system for all motor carriers, or whether this system was preempted under 49 U.S.C. § 14501(c). The court upheld the Commission's actions because "it is difficult to conceive of an order that would fall more directly than the one at issue into the express exemption for safety regulation from the scope of preemption." *Michigan Trucking Ass'n*, 571 N.W.2d at 736-37. This unobjectionable conclusion obviously does not raise the same issues presented by the decision below in this case. In particular, because that case did not even involve municipal regulations, the court never cited or had any occasion to consider the application of subsection (c)(2)(A).

Second, the intermediate state court ruling in *People ex rel. Renne v. Servantes*, 86 Cal. App. 4th 1081, 103 Cal. Rptr. 2d 870 (Cal. App. 1st Dist. 2001), *review denied*, No. S095954 (Cal. May 16, 2001), *cert. pending* (Case No. 01-336), while sharply critical of the line of decisions later joined by the court below, explicitly rested its judgment on two adequate and independent state grounds. In *Servantes*, the San Francisco City Attorney brought suit against a towing company and its owner for unfair business practices under California law, seeking civil penalties and disgorgement of profits as well as a permanent injunction against further unlawful conduct. Following a six-day trial, the trial court found that the defendant "had committed hundreds of violations of state and local laws and ordered him to pay a civil penalty of $74,700." 103 Cal. Rptr. 2d at 873. The illegal acts documented at trial included repeated instances of unauthorized tows where the owners were later forced to pay cash in order to retrieve their vehicles. *Id.* at 874-75.

On appeal, defendant argued that the state and local laws under which he was found liable were preempted by federal law and thus unenforceable. The state court of appeals rejected his arguments that San Francisco's towing regulations were

preempted, focusing in particular on its disagreements with the Ninth Circuit's analysis in the *Tocher* case, which it noted was not considered binding upon the state courts. *See id.* at 876-80. The court then went on to make clear, however, that all of this discussion of the municipal regulations amounted to *dicta* because its ruling also rested on alternative grounds under California law:

> In any event, even if we were to conclude otherwise and find the San Francisco ordinances preempted by the FAAA Act, we would have no hesitation in affirming the trial court's judgment here. The trial court principally based its judgment upon Servantes' violations of state law, specifically Vehicle Code section 22658.[4] Although the court additionally found that Servantes had violated the permit requirements of the San Francisco Police Code, the court imposed no additional penalties on account of these particular violations.

Id. at 881. Accordingly, the court held that the trial court's ruling was fully subject to affirmance based *solely* on defendant's repeated violations of *state* law, even aside from his additional violations of any municipal regulations.

In addition, the court continued on to identify yet another adequate and independent ground for its decision under state law:

> Furthermore, California's Unfair Competition Act prohibits not only unlawful business practices but also

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[4] As the *Servantes* court had explained elsewhere in its opinion, the State of California itself has enacted statutes that regulate the removal of vehicles from private property by a towing service, which require notification of the police, authorization from the property owner, the acceptance of credit card payments, and compliance with restrictions on excessive charges, all of which is enforced by civil penalties. *See* 103 Cal. Rptr.2d at 873 & n.3 (discussing the provisions of Cal. Veh. Code § 22658).

> unfair business practices. (Bus. & Prof. Code § 17200 et seq.) The statute is intentionally broad to give the court maximum discretion to control whatever new schemes may be contrived, even though they are not yet forbidden by law. . . . Here, the injuries inflicted upon the unwitting victims were substantial, while the conduct of Servantes was entirely unethical and unscrupulous with no redeeming value. . . .
>
> We find no error in the trial court's conclusion that the conduct of Servantes constituted unlawful business practices in violation of Business and Professional Code section 17200 et seq.

Id. Thus the court made clear that its decision did not depend at all on whether defendant was found to have actually *violated* any valid state or local regulations. Accordingly, its preemption analysis was in no way essential to its judgment affirming the trial court. For this reason also, therefore, the state court's ruling in *Servantes* poses no direct conflict with the ruling below in this case.

Third, the Second Circuit's decision in *Ace Auto Body & Towing Ltd. v. City of New York*, 171 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999), is also distinguishable from the decision below in this case. *Ace Auto* was one of the first cases brought after Congress amended the preemption clause in the ICA by enacting the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, § 103, 109 Stat. 803, 899. In that case, a group of tow truck companies brought a declaratory judgment action contending that certain of New York City's towing regulations were preempted under 49 U.S.C. § 14501(c). Plaintiffs sought a preliminary injunction, and after submitting all relevant evidence, plaintiffs "specifically limited their motion for a preliminary injunction to discrete aspects of the regulations governing the towing of vehicles disabled in the context of accidents." *Ace Auto Body & Towing, Ltd. v. City of New York*, No. 96-CIV-6547, 1997 WL 669891, at *1 (S.D.N.Y. Oct. 28, 1997), *aff'd*, 171 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999). The trial court denied plaintiffs' motion, finding that the challenged measures were exempt from preemption under the safety regulation exemption contained in subsection (c)(2)(A). *See id.* On cross-motions for summary judgment, the trial court reached the same conclusion, finding that the challenged regulations were not preempted.[5]

The measures at issue in *Ace Auto* concerned the eligibility requirements for and the administration of New York City's regulations governing *nonconsensual* towing of vehicles that were either disabled in accidents or were abandoned or stolen. The City had adopted three related programs to deal with such vehicles. The DARP and SARD programs[6] were adopted for the express purpose "of eradicating the problem of accident 'chasing' in the tow truck industry," whereby tow trucks monitored police reports and raced one another to the scene of an accident to procure any towing business generated there. *Id.* at *7. This goal was accomplished by dividing the City into specific zones and requiring any disabled vehicle to be towed by a qualified towing company summoned to the scene by the Police Department, regardless of the owner's wishes in the matter. *See id.* at *2-4. "For this reason, towing in the context of vehicular accidents is deemed to be 'nonconsensual,' as the vehicle owner has no other lawful towing option." *Id.* at *2.

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[5] The only ground on which the trial court granted relief to the plaintiffs concerned the unrelated issue of the City's single maximum rate scheme as applied to consensual tows. The parties stipulated that this provision was preempted by negative inference from subsection (c)(2)(C), which expressly allows state and local governments to regulate the price of nonconsensual tows, and argued only over whether Congress had exceeded its authority under the Commerce Clause by enacting this provision, a claim that the trial court rejected. *See Ace Auto*, 1997 WL 669891, at *11.

[6] "DARP" is the acronym for the "Directed Accident Response Program," and "SARD" is the acronym for the "Special Accident Response Districts" program. "ROTOW" is the abbreviation used to designate the "Rotation Tow Program." 1997 WL 669891, at *2, 4.

The ROTOW program, which also operates by dividing the City into zones, governs "the removal of vehicles suspected of having been stolen or abandoned," and "[t]owing under ROTOW therefore is nonconsensual, by definition." *Id.* at *4 (quotation omitted). Plaintiffs challenged the validity of these measures along with the City's general licensing and other eligibility requirements to participate in these programs, all of which the trial court upheld.

Significantly, in *Ace Auto* the trial court *did not even address* the statutory preemption issue highlighted by petitioners here – whether the statutory safety exemption set out in subsection (c)(2)(A) extends not only to state towing regulations, but also exempts "local tow-truck regulations" from the scope of the express preemption clause set out in subsection (c)(1). Pet. 7. Instead, in a footnote the court simply noted that plaintiffs had *conceded* this point: "Plaintiffs do not dispute that the exception provided by Section 14501(c)(2)(A), limited in terms to the 'safety regulatory authority of a *State*,' *id.* (emphasis added), applies as well to the safety regulatory authority of a *municipality* such as the City." *Ace Auto*, 1997 WL 669891, at *7 n.7. Thus the trial court's discussion of the statutory preemption issue was limited primarily to consideration of whether the DARP, SARD, and ROTOW programs, along with the related licensing regulations that governed eligibility for them, could be legitimately classified as "safety" regulations within the meaning of the federal statute. The trial court had no trouble concluding that they could. *See id.* at *7-11.

On appeal, the Second Circuit affirmed. It began by agreeing that the DARP, SARD, and ROTOW programs were clearly enacted for safety reasons, "to combat the practice of 'chasing'" and to remove "'abandoned and stolen vehicles that may (for example) present hazards to other motorists or opportunities for misuse to criminals or children.'" *Ace Auto*, 171 F.3d at 774 (quoting trial court opinion). It then went on, at its own initiative, to consider the views stated in *R. Mayer of*

Atlanta, Inc. v. City of Atlanta, 158 F.3d 538 (11th Cir. 1998), where the Eleventh Circuit had concluded that 49 U.S.C. § 14501(c)(1) expressly preempts "municipal ordinances that are 'related to' the price, route, or provision of consensual towing operations," even though plaintiffs had defaulted this point in the trial court. *Id.* at 545; *see* 1997 WL 669891, at *7 n.7. Without taking note of the substantive distinction between municipal regulation of *consensual* towing services, which were solely at issue in the *R. Mayer* case, and the DARP, SARD, and ROTOW programs regulating *nonconsensual* towing, the Second Circuit disagreed with the Eleventh Circuit's statutory analysis of subsection (c)(2)(A). *See Ace Auto*, 171 F.3d at 775-76. It then went on to uphold the licensing and eligibility requirements applicable to these programs, including the special requirements that DARP and SARD participants must maintain their own storage and repair facilities. *See id.* at 769, 776-77.

Neither *R. Mayer* at the time, nor any of the subsequent decisions by the federal appellate courts, is in conflict with the Second Circuit's concrete holding in *Ace Auto* – that 49 U.S.C. § 14501(c)(1) does not preempt municipal safety regulations governing *nonconsensual* tows that are performed under the direction of the local police. Both *R. Mayer* and the rulings in this case involved only limited challenges to local regulations governing *consensual* towing operations, which the courts have consistently held to be preempted. In the other cases, such as *Petrey*, *Stucky*, and *Tocher*, the circuit courts likewise have distinguished between local regulations governing consensual tows, which are preempted, and those governing nonconsensual tows performed at the direction of municipal officials, which are not preempted under the municipal proprietor exception to federal preemption. *See Stucky*, 260 F.3d at 434-46 (city can regulate nonconsensual tows but not consensual tows, for the latter are preempted); *Petrey*, 246 F.3d at 555-64 (same) (Pet. App. 13a-29a); *Tocher*, 219 F.3d at 1045-52 (same); *see also Cardinal Towing*, 180 F.3d at 691-95 (upholding city's nonconsent towing ordinance). It is true that the Second Circuit

reached that result by a different route than the other circuits – the Second Circuit used the statutory exemption in subsection (c)(2)(A) to uphold nonconsensual tows, whereas the others used the municipal proprietor exception. And it is true that the lower courts have disagreed at times over the proper interpretation and application of the statutory exemption for safety regulations that is contained in subsection (c)(2)(A). Nonetheless, a mere difference in legal analysis does not rise to the level of conflicting judgments and does not support petitioners' claim that a cognizable split exists among the relevant decisional authorities here.[7]

Petitioners acknowledge that the clear weight of lower court authority on the statutory preemption issues they have raised favors respondents. *See* Pet. 6. But there is no disagreement at all on the issue presented in *this* case: whether municipal regulation of consensual towing operations is preempted. And even the lower court decisions concerning nonconsensual tows – not directly at issue here – are all reconcilable as discussed above. In sum, no square conflict exists among the lower court decisions that would justify plenary review in this case or in any other case at this time.[8]

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[7] Respondents agree with petitioners that the district courts have issued disparate opinions on the preemption issues raised in these cases, but would note that *all* of the district court rulings cited in the petition, *see* Pet. 14, have arisen out of the Fifth, Sixth, and Ninth Circuits, and thus are now reconciled by the consistent and controlling authority of the circuit court decisions in *Stucky*, *Petrey*, and *Tocher*.

[8] The foregoing discussion also dispels petitioners' assertions that "the Sixth and Ninth Circuits on the one hand and the California and Michigan state courts on the other have reached different conclusions about the same issue and with respect to the same jurisdiction," Pet. 13; *see also id.* at 15, at least insofar as this alleged disharmony between overlapping authorities is offered as a further justification for granting plenary review in this case.

C. The Court Has Denied Review on These Issues Several Times and Nothing Has Occurred in the Interim to Justify Plenary Review Here.

The statutory preemption issues raised in this case have come before the Court on several prior occasions. *See Ace Auto Body & Towing Ltd. v. City of New York*, 171 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999). Each time, the Court has found these issues to be unworthy of review. The ostensible conflict between *Ace Auto*'s holding endorsing the validity of safety regulations governing *nonconsensual* tows and the substantial line of circuit court decisions holding that municipal regulation of *consensual* towing operations is preempted was presented in each of these cases, and this Court found no need to act. Indeed, earlier this year, the Court denied a petition for certiorari in another such case without even calling for a response. *See, e.g.*, *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1085 (2001).

Nothing has occurred in the interim to alter the Court's considered judgment that these issues do not justify a grant of plenary review. Earlier this year, an intermediate state court in California decided the *Servantes* case, and sharply criticized the Ninth Circuit's statutory analysis in *Tocher*. Yet, as discussed above, that intermediate state court also placed its decision on two independent state grounds, thereby revealing that much of its criticism is properly regarded as *dicta*. *See supra* pages 9-11. Since then, the Fifth Circuit has decided *Stucky*, and the lower court here has decided both *Petrey* and this case – all of which agree with the existing mass of decisional authority that municipal regulation of consensual towing operations is expressly preempted. In addition, both *Stucky* and *Petrey* reflect the continuing development and increasing acceptance of the municipal proprietor exception to preemption as grounds for upholding municipal safety regulation in this area. *See Stucky*, 260 F.3d at 434-46 (under municipal proprietor exception to

preemption, city can regulate nonconsensual tows but not consensual tows, and regulations that apply to latter are preempted by federal law); *Petrey*, 246 F.3d at 555-64 (same) (Pet. App. 13a-29a); *see also Tocher*, 219 F.3d at 1045-52 (same). This evolution of the legal analysis in the lower courts continues to undercut the importance of the narrower statutory issue of how to reconcile the terms of the statutory exemption in subsection (c)(2)(A) with the terms of the express preemption clause in subsection (c)(1), thereby making it even less urgent for the Court to intervene to address these issues at this time.

Moreover, even if the alleged conflict did exist, and even if its consequences were as important as petitioners claim, this case would be a poor vehicle for resolving it. First, the brief opinion that was issued below undertook no independent review of the City of Columbus' towing regulations. Instead, it simply rested on the City's stipulation that the legal issues here were controlled by the lower court's recent decision in the *Petrey* case, and thus decided without more that the regulations are invalid as applied to consensual towing operations. *See* Pet. App. 2a. The court below thus had no occasion in this case – in contrast to *Petrey* and other recent cases – to consider *either* the effect of the "municipal proprietor" exemption to the express preemption clause *or* the validity of the City's regulations as they apply to nonconsensual towing operations. The lower courts' legal analysis of the City's attempts to regulate consensual towing operations thus occurred in something of an analytical vacuum here, divorced from the principal safety issues raised in many of the other cases. As a result, this case does not represent a suitable vehicle for deciding the central preemption issues raised under this federal statutory scheme.

II. THE COURT BELOW CORRECTLY JOINED THE CIRCUIT COURTS HOLDING THAT MUNICIPAL REGULATION OF CONSENSUAL TOWING OPERATIONS IS EXPRESSLY PREEMPTED.

Petitioners also contend that the court below erred in "holding that the City of Columbus may not regulate private

towing activities in the same way that the City of New York may." Pet. 16. As discussed earlier, this contention as stated is inaccurate, since the DARP, SARD, and ROTOW regulatory safety programs that the Second Circuit upheld in *Ace Auto* would all be exempt from preemption as well under the Sixth Circuit's analysis and holding in the *Petrey* case. But in any event, the decision below on the statutory preemption issue, which petitioners concede is consistent with the great weight of lower court authority, is entirely correct and harmonizes with this Court's controlling precedents in this area.

In particular, petitioners contend here, as they did below, that this Court's decision in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), compels a different result. In that case, the Court held that under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), the states were permitted to redelegate authority to political subdivisions to regulate pesticides, even without explicit statutory language so providing, where FIFRA simply says, without elaboration, that a "State" may regulate pesticides. *See* 7 U.S.C. § 136v(a). The Court accepted this unexceptionable proposition in the course of deciding that the regulations at issue were valid because Congress had not provided for express preemption or field preemption in FIFRA, and there was no basis for finding implied preemption under the circumstances presented. *See Mortier*, 501 U.S. at 604-16.

As the lower courts have recognized, the statutory framework under the ICA differs from FIFRA in significant respects. First, unlike FIFRA, the ICA contains an express preemption clause that clearly applies both to state and local governments. *See* 49 U.S.C. § 14501(c)(1). Thus, the issue here is not whether preemption should be *inferred* – whether lightly or otherwise – since Congress specifically provided for it. Instead, the issue is how broadly to read a statutory *exception* to an express preemption clause. Hewing to a careful analysis of the statutory text, the courts have noted that because Congress employed the term "political subdivision" no fewer

than *seven* times in this *single* statutory section containing the express preemption clause, but declined to include that term in subsection (c)(2)(A), it must be presumed to have acted purposely and its intentional choice must be given effect. *See, e.g.*, *Petrey*, 246 F.3d at 561; *R. Mayer*, 158 F.3d at 545.

This is, indeed, a much more pointed and forceful instance of the standard canon of statutory construction that when "Congress includes particular language in *one section* of a statute but omits it in *another section* of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (emphasis added). This time-honored canon may be invoked by the Court more frequently than any other, and has long been established as an essential guide to determining the plain language of congressional enactments.[9] Here, where Congress repeatedly used the same language in the same section and then notably omitted it from one particular subsection, the applicability of this canon is at its zenith.

Without belaboring the merits of the ruling below, there are other sound reasons why the circuit courts have generally been persuaded to construe the statutory exemption from express preemption in subsection (c)(2)(A) as not encompassing municipalities. First, this reading of the express preemption

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[9] *See, e.g.*, *Hohn v. United States*, 524 U.S. 236, 250 (1998); *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 418 (1998); *Bates v. United States*, 522 U.S. 23, 29-30 (1997); *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Field v. Mans*, 516 U.S. 59, 67 (1995); *Brown v. Gardner*, 513 U.S. 115, 120 (1994); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 95 (1994); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994); *Custis v. United States*, 511 U.S. 485, 492 (1994); *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

clause in section 14501(c) furthers the policy of deregulation underlying enactment of the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, § 103, 109 Stat. 803, 899. That legislation, which abolished the ICC and cleared the way for nationwide deregulation of motor carriers, advanced its deregulatory objectives by ensuring their freedom from an entangling web of overlapping and contradictory regulations at the local level. *See, e.g.*, *R. Mayer*, 158 F.3d at 546.[10]

Second, although petitioners attempt to parse the specific language of subsection (c)(2)(A)'s exemption in one respect, speculating about Congress' use of the phrase "safety regulatory authority," they fail to comment on the fact that the limited exemption from preemption for the States is articulated in terms of regulating "motor vehicles," not "motor carriers" or "tow truck[s]," as is the case elsewhere in subsection (c)(2). Thus the desired exemption for municipal authority that petitioners seek to import into the statute would be much broader than they have suggested.

Third, the reading urged by petitioners "would lead to the absurd result that Congress can never preempt local regulations and simultaneously leave a state's ability to regulate intact." *See, e.g.*, *Tocher*, 219 F.3d at 1051. As noted above, however, there are especially good reasons for Congress to take this course where, as in this legislation, it is consciously seeking to implement an explicit program of deregulation.

Fourth, it would be particularly odd to conclude that Congress expressly intended to preserve municipal authority to regulate towing operations through the nonspecific language in subsection (c)(2)(A) when it used highly specific language to do

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[10] *See also* H.R. Conf. Rep. No. 103-677, at 87 (1995), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759 ("The conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. . . . The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.").

so with respect to municipal authority to regulate the *price* of *nonconsensual* "for-hire motor vehicle transportation by a tow truck" in subsection (c)(2)(C).[11]

Thus nothing in the decision below is inconsistent with this Court's settled preemption jurisprudence. At most, therefore, petitioners are simply dissatisfied with how the court of appeals applied those established standards on the facts of this case. The court below did not err in this respect, as explained above, but in any event the issue of whether the court misapplied the proper legal standards is not worthy of plenary review here.

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[11] The House Committee Report's telling explanation of this provision in subsection (c)(2)(C) stated:

> This is only intended to permit States or political subdivisions thereof to set maximum prices for non-consensual tows, and is not intended to permit re-regulation of any other aspect of tow truck operations.
>
> The Committee had been asked to go farther and permit States and political subdivisions thereof to re-regulate all aspects of non-consensual tow truck services. The Committee provision struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services.

H.R. Rep. No. 104-311, at 121 (1995), *reprinted in* 1994 U.S.C.C.A.N. 793, 831-32.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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